

NO. 45816-1-II
Cowlitz Co. Cause NO. 13-1-00868 5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

AARON L. LINDER,

Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred in suppressing the evidence because an officer's failure to inventory items searched in the presence of at least one other person, as required by CrR 2.3(d), violates no constitutional precept, is ministerial in nature, and did not prejudice the defendant.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The rules for the execution and return of a valid search warrant are ministerial in nature. Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. This principle has been applied by Washington courts in a variety of circumstances where the rules for execution of a warrant have been violated. If the search violates no constitutional precept and the requirements of the rule are ministerial, then suppression will be ordered as a remedy for violation only where prejudice can be shown.

An officer's violation of CrR 2.3(d) for failing to inventory items searched in the presence of at least one other person violates no constitutional precept, is ministerial in nature, and did not prejudice the respondent; therefore, the trial court should not have suppressed the evidence.

III. STATEMENT OF THE CASE

The respondent was charged with one count of Violation of Uniform Controlled Substances Act for possessing of methamphetamine. CP 1, p. 1-2. Prior to trial, the respondent's attorney filed a motion to suppress the evidence for violation of Cr.R 2.3(d). CP 8 and CP 12, p. 5-8. The State filed its response and argued that suppression was not warranted because the officer's violation of CrR 2.3(d) is ministerial and did not prejudice the respondent. CP 18, p. 9-18. On December 23, 2013, Judge Steven Warning of the Cowlitz County Superior Court presided over the respondent's 3.6 motion. After hearing testimonies of witnesses and arguments of the attorneys, Judge Warning suppressed the drug found in the case because the officer violated CrR 2.3(d) for failing to inventory items searched in the presence of at least one another person. Transcript, p. 49-51. On January 16, 2014, Judge Warning entered his findings and conclusions for the 3.6 motion. CP 24, p. 19-24. The State now appeals the trial court's suppression of the evidence for violation of CrR 2.3(d). CP 26, p. 26.

IV. FACTS

On March 25, 2013, at approximately 1:29 PM, Chief Gibson of the Kalama Police Department observed the respondent drive a truck.

Chief Gibson recognized the respondent from prior contacts and knew his driver's license was suspended from confirmation earlier in the day. Transcript, p. 23-26. Chief Gibson contacted and arrested the respondent for driving with a suspended driver's license. Transcript, p. 26. Chief Gibson searched the respondent incident to his arrest and found a small rectangular "Wrigley" metal box in the pocket of his hoodie. Chief Gibson did not look into the "Wrigley" metal box as part of his search of the respondent incident to his arrest. Transcript, p. 26-27. Post Miranda, the respondent admitted that the metal box contained drug paraphernalia that he used to smoke illegal narcotics. Transcript, p. 27. The respondent refused to give his consent for Chief Gibson to search the box. Chief Gibson took the box into evidence and the respondent was transported and booked into the Cowlitz County Jail. Transcript, p. 28-29.

On March 25, 2013, at approximately 5:00 PM, Sergeant Parker of the Kalama Police Department arrived at the Kalama Police Department to start his shift. Transcript, p. 4, 6, and 29. Sergeant Parker did not stop and arrest the respondent, did not seize evidence from the respondent, and had no ill wills, grudges, or vendettas against the respondent. Transcript, p. 6-7. Sergeant Parker is a canine officer and his canine, Amy, is trained to detect narcotics. Transcript, p. 5-6 and 9. Chief Gibson had Sergeant Parker deploy Amy on the respondent's metal box. Sergeant Parker

deployed Amy on the “Wrigley” metal box and Amy gave a positive alert for the presence of narcotics. Transcript, p. 7-9 and 29-30. On March 25, 2013, Sergeant Parker drafted a search warrant for the box and emailed it to the Cowlitz County Prosecuting Attorney’s Office for review. Transcript, p. 9.

On March 26, 2013, Sergeant Parker received an email from Deputy Prosecutor David Phelan indicating his search warrant application was approved for submission to a judge. Transcript, p. 9. On March 26, 2013, at 11:30 PM, Sergeant Parker was able to locate a judge, Judge Ronald Marshall of the Cowlitz County District Court, to review and approve the search warrant. On March 26, 2013, a few minutes before midnight, Judge Marshall signed the search warrant for the respondent’s “Wrigley” box. Transcript, p. 10.

On March 27, 2013, a little after midnight, Sergeant Parker returned to the Kalama Police Department and executed the search warrant. Sergeant Parker was working alone at the time and it is normal for there to only be one officer on duty at night due to the Kalama Police Department’s staff size. The Kalama Police Department has a total of five sworn police officers. Transcript, p. 10-11 and 15. Prior to inventorying the contents of the box, Sergeant Parker opened the box and took a photo, Exhibit # 1, of the contents as they were situated inside the “Wrigley” box.

Exhibit # 1 shows there was a clear plastic baggie with a purplish sticker located atop the contents inside the box. Transcript, p. 11-12. To do an inventory of the items inside the box, Sergeant Parker removed all the items inside the box, placed all the removed items onto a table, took a photo, Exhibit # 2, of all the contents of the box, and wrote out an inventory list of the removed items. Exhibit # 2 shows a clear plastic baggie with a purplish sticker and inside the baggie is a crystal substance. The plastic baggie with a purplish sticker in Exhibit # 2 is the same baggie in Exhibit # 1. Inside the box, Sergeant Parker found 2 pieces of aluminum foil, an empty small plastic box, 2 plastic tubes, a hair pin, a safety pin, and a clear plastic baggie with a purplish sticker. Transcript, p. 12-15. After searching, photographing, and inventorying the respondent's box, Sergeant Parker packed up the contents, placed the contents in an evidence locker, and left a note for Chief Gibson. Transcript, p. 14-15 and 30-32. At the time of the search of the respondent's box, Sergeant Parker was not aware of CrR 2.3(d) and its requirement that the inventory of items searched shall be made in the presence of at least one person other than the officer. Transcript, p. 21. The searching of the box and inventorying of its contents concluded Sergeant Parker's involvement in the case. Transcript, p. 15.

On March 27, 2013, at approximately 9:30 AM, Chief Gibson returned to work and received Sergeant Parker's supplemental report and photos regarding his search of the respondent's box. Transcript, p. 31-32. Chief Gibson retrieved the box and its content from the evidence locker, verified the contents in the box matched Sergeant Parker's inventory, and packaged the items from the box for submission to the crime laboratory. Transcript, p. 30-34. The clear plastic baggie with a purplish sticker contained chunks of a crystal substance. Chief Gibson photographed the clear plastic baggie, Exhibit # 3, and submitted it to the crime lab for testing. Transcript, p. 33-35. Chief Gibson was not aware of CrR 2.3(d) and its requirement that the inventory of items searched shall be made in the presence of at least one person other than the officer. Transcript, p. 34.

On July 9, 2013, the respondent was charged with one count of Violation of Uniform Controlled Substances Act for possessing of methamphetamine. CP 1, p. 1-2. Prior to trial, the respondent's attorney filed a motion to suppress the evidence for violation of Cr.R 2.3(d). CP 8 and CP 12, p. 5-8. The State filed its response and argued that suppression was not warranted because the officer's violation of CrR 2.3(d) is ministerial and did not prejudice the respondent. CP 18, p. 9-18.

On December 23, 2013, Judge Steven Warning of the Cowlitz County Superior Court presided over the respondent's 3.6 motion.

Transcript, p. 3-52. Judge Warning heard testimonies from Chief Gibson and Sergeant Parker to the facts cited above. Transcript, p. 3-38. While Judge Warning did not, “in any way, shape, or form, question Officer Parker - - or Sergeant Parker or Chief Gibson as to what happened. I don’t suggest or think that anybody did anything untoward with the evidence,” Transcript, p. 50, Judge Warning suppressed the drug found in the clear plastic baggie with the purplish sticker because Sergeant Parker inventoried the searched items without having another person being present. Transcript, p. 49-51.

V. ARGUMENT

“The rules for the execution and return of a valid search warrant are ministerial in nature.” State v. Parker, 28 Wash.App. 425, 426 (1981). “Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits.” Id. at 427. “This principle has been applied by Washington courts in a variety of circumstances where the rules for execution of a warrant have been violated.

FN1. See Parker, 28 Wash.App. at 426, 626 P.2d 508 (officer served unsigned copy of warrant); State v. Smith, 15 Wash.App. 716, 719, 552P.2d 1059 (1976) (warrant failed to designate magistrate for return); State v. Bowman, 8 Wash.App. 148, 150, 504 P.2d 1148 (1972)

(officer failed to properly serve defendant with warrant); State v. Wraspir, 20 Wash.App. 626, 629, 581 P.2d 182 (1978) (officer failed to take inventory in presence of other person).” State v. Kern, 81 Wash.App. 308, 311 (1996).

“If the search violated no constitutional precept, the requirements of the rule were ministerial, and suppression will be ordered as a remedy for violation only where prejudice can be shown.” Id. at 312.

Pursuant to CrR 2.3(d), “Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from who or from whose premises the property was taken and to the applicant for the warrant.”

In State v. Parker, a warrant was duly issued for a search of the defendants’ residence. 28 Wash.App. at 426. “The original was dated and

signed by the magistrate. At the time of the search, a nonconformed copy was given to the defendants, since it was neither signed in the space provided for the issuing magistrate's signature, nor dated." Id. In Parker, the trial court granted the defendant's motions to suppress the evidence because the officer served an unsigned copy of the warrant on the defendants in violation of CrR 2.3(d). Id. On appeal, the appellate reversed the trial court's suppression of the evidence because the officer's violation of CrR 2.3(d) was ministerial and the defendants made no showing of prejudice. Id. at 427.

In State v. Kern, the defendant sought to suppress bank records recovered by an officer during the execution of a search warrant because the officer failed to file a proper inventory and warrant return as required by CrR 2.3(d). 81 Wash.App. at 318. The court found it was "not proper for officers to file inventories of items seized in a search before the items are actually in police custody." Id. However, the court denied the defendant's motion to suppress the bank records because the officers' violation of CrR 2.3(d) was ministerial and the defendant alleged, "no prejudice resulting from [the officer's] premature filing. Thus, suppression is not appropriate." Id.

In State v. AASE, 121 Wash.App. 558 (2004), the defendant sought to suppress evidence an officer found during the execution of a

search warrant because the officer who conducted the search provided the defendant with a copy of the search warrant several minutes into the search. Id. at 562 and 565. The trial court denied the defendant's motion to suppress and the defendant was convicted of possession of methamphetamine on a bench trial on stipulated facts. Id. at 563. On appeal, the appellate court found affirmed trial court's denial of the defendant's motion to suppress. The appellate court noted that "even assuming Alloway and the officers 'deliberately' violated CrR 2.3(d), [the defendant] does not argue that he was prejudiced by the several-minute delay or that the search would have somehow been less intrusive had he been able to immediately see the warrant. Suppression is not required." Id. at 568.

In State v. Wraspir, six officers served a search warrant and searched the defendants' trailer for drugs. The defendants owned the trailer and were absent during the search. Inside the trailer, officers contacted two individuals and removed the two individual from the scene. The officers searched the trailer, found drugs, and inventoried the evidence outside the presence of the two individuals found inside the trailer. After the search of the trailer and inventory of the evidence, an officer checked the inventory list and found that it was true and accurate. 20 Wash.App. at 627. The defendants were charged with possession of

controlled substances and sought to suppress the evidence for violation of CrR 2.3(d). The trial court suppressed the evidence because the two men who had been in the trailer were not present during the officers' inventory of the evidence. Id. at 628. On appeal, the appellate court noted that, "[t]he purpose of the rule seems to be to safeguard, if possible, against errors, willful or inadvertent, by one officer acting alone." Id. at 629. The appellate court found that, "[t]he purpose of the rule was adequately followed and satisfied; sufficient checks and balances were demonstrated in this case. Additionally, defendants have shown no prejudice if in fact the rule were violated; therefore, suppression would be inappropriate." Id. at 630. The trial court's order for suppression of the evidence was reversed by the appellate court. Id.

In State v. Temple, 170 Wash.App. 156 (2012), the defendant appealed his conviction for possession of methamphetamine and challenged the search warrant that was used to seize the methamphetamine and a glass pipe found inside his bedroom. The defendant claimed police did not follow the proper procedures for issuance, service, and return of a warrant. Id. at 158. The defendant identified the following errors by the police: "(1) the search warrant affidavit, the search warrant, the search warrant return, and the search warrant inventory were not filed with the issuing court; (2) the search warrant return was not accompanied by the

inventory of property seized; (3) the police did not provide Temple with a copy of the warrant or a receipt of the property seized; and (4) the search warrant inventory was not made in the presence of any other person and falsely states that it was.” Id. at 161. On appeal, the appellate court noted that “[t]he rules for the execution and return of a valid search warrant are ministerial in nature. Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits.” Id. at 152. The appellate court affirmed the defendant’s conviction because the defendant “failed to establish prejudice from any ministerial error relating to the warrant.” Id. at 165.

In the present case, Sergeant Parker’s failure to inventory searched items in the presence of another person per CrR 2.3(d) did not prejudice the respondent and the evidence should not have been suppressed. In Temple, the officer failed to comply with the rules for the execution and return of a valid search warrant in far more ways and in far more egregious manners than Sergeant Parker, but the appellate court still declined to suppress the evidence because the rules violated are ministerial in nature and the defendant did not establish prejudice from any of the ministerial errors. 170 Wash.App. at 152, 161, and 165. Among the errors committed in the Temple case was “the search warrant inventory was not made in the presence of any other person and falsely states that it

was.” Id. at 161. The present case is far less egregious than the Temple case because the only error in the present case was a failure to inventory items searched in the presence of another person per CrR 2.3(d). Therefore, the evidence should not have been suppressed because the error is ministerial in nature and the respondent was not prejudiced by the error.

Officers in the respondent’s case did not have motive to tamper with the evidence. Sergeant Parker has no bias or motive to alter the evidence to prejudice the respondent as he was not the arresting officer, the respondent’s case was not his case, and he has no ill wills, grudges, or vendettas against the respondent. The evidence indicates that Chief Gibson went out of his way to ensure that the respondent’s rights were protected. While Chief Gibson could have lawfully looked into the respondent’s box as part of his search of the respondent incident to the respondent’s arrest, Chief Gibson elected to ask the respondent for his permission to look inside the box. When the respondent refused to give his consent, Chief Gibson respected the respondent’s refusal to give consent and did not look into the box. Instead, Chief Gibson requested Sergeant Parker deploy a narcotics canine on the box and get a search warrant. Both officers’ lack of motive to tamper with the evidence was recognized by Judge Warning as Judge Warning indicated that he did not “in any way, shape, or form, question Officer Parker - - or Sergeant Parker

or Chief Gibson as to what happened. I don't suggest or think that anybody did anything untoward with the evidence." Transcript, p. 50.

Furthermore, there were sufficient checks and balances to safeguard against possible errors, willful or inadvertent, by one officer doing an inventory of the items found inside the respondent's metal box. Sergeant Parker took two pictures, Exhibit # 1 and # 2, of the contents of the box and did an inventory of the items. Within 24 hours, Chief Gibson verified the contents in the respondent's box matched Sergeant Parker's inventory and took another picture, Exhibit # 3. Exhibit # 3 shows a clear plastic baggie with a purplish sticker and crystal substance. The clear plastic baggie with a purplish sticker and crystal substance as shown in Exhibit # 3 matches the clear plastic baggie with a purplish sticker and crystal substance as shown in Exhibit # 1 and Exhibit # 2, pictures taken by Sergeant Parker. The cross check and verification of the contents of the respondent's box show there was no error about the clear plastic baggie with purplish sticker and crystal substance being inside the respondent's box. There is no claim by the respondent that the baggie and drug did not come from the respondent's box. There is no claim by the respondent that the baggie and drug was tampered with or altered by the officers. The respondent did not show how Sergeant Parker's noncompliance with CrR 2.3(d) caused him prejudice. All the evidence

indicates the baggie and drug came from the respondent's box and the baggie and drug appeared as captured in Exhibit # 1, Exhibit # 2, and Exhibit # 3.

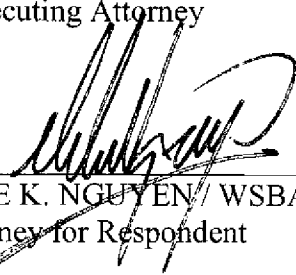
Sergeant Parker's noncompliance with CrR 2.3(d) did not prejudice the respondent and CrR 2.3(d) is ministerial in nature. Therefore, the trial court erred in suppressing the evidence because CrR 2.3(d) is ministerial in nature and the respondent did not show that Sergeant Parker's noncompliance with CrR 2.3(d) caused him prejudice.

VI. CONCLUSION

The trial court erred in suppressing the evidence because Sergeant Parker's failure to comply with CrR 2.3(d) is ministerial in nature and the respondent has not shown he is prejudiced by the error. Therefore, the case should be remanded back to the trial court to reverse the trial court's order to suppress the evidence.

Respectfully submitted this 30th day of May 2014.

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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 27th, 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 30, 2014 - 2:40 PM

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